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Nos. 81-2147, 81-2188

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE STATE OF ARIZONA, ET AL.,
Petitioners,
versus
SAN CARLOS APACHE TRIBE OF ARIZONA
AND THE NAVAJO TRIBE OF INDIANS, ET AL.,

THE STATE OF MONTANA, ET AL.,
Petitioners,
versus
NORTHERN CHEYENNE TRIBE OF THE NORTHERN
CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF PETITIONERS IN NO. 81-2147 FOR LEAVE TO FILE A RESPONSE TO THE UNITED STATES' POST-ARGUMENT MEMORANDUM
AND
RESPONSE OF PETITIONERS IN NO. 81-2147 TO THE UNITED STATES' POST-ARGUMENT MEMORANDUM

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The Arizona Petitioners object to the motion of the United States.

We object, not because more elucidation of the government's proposal is unnecessary, but precisely because it is necessary, but can only properly occur in another forum, the Congress. There, the kind of factual information necessary to evaluate the practical effect of such proposals can be developed; no time or space limitations constrain the debate; and, all policy, political and practical problems can be thoroughly addressed. The issues the United States

now[1] wishes to more fully address—the practical problems of and rationale for its split-adjudication proposal—are exactly the kinds of issues Congress wrestled with in adopting the McCarran Amendment.

None of the cases before this Court involve the government's proposal, which was raised for the first time at the Supreme Court stage of this litigation. The procedural posture of the cases would have to be substantially changed before the issues addressed in the government's memorandum would be relevant.

The only legitimate questions before the Court are (1) whether disclaimers in the Enabling Acts of most western states bar application of the McCarran Amendment in those states, and (2) assuming concurrent federal and state jurisdiction, whether considerations of wise judicial administration support adjudication of all water claims in the state courts of Arizona and Montana. Those issues have been fully briefed and argued. No further briefing should be necessary.

In the alternative, should the Court grant leave to the United States to file its post-argument memorandum, the Arizona Petitioners move pursuant to Rule 35.6 of the Rules of this Court for leave to file the annexed memorandum in response to the government's memorandum. The memorandum of the United States is not just an answer to questions posed by the Court; it is a readjustment of arguments in its brief. See *United States' Brief* at 23-39. If it is appropriate for the government to file a memorandum because of "the special circumstances of these complex cases, of substantial importance for all water users in the West,

[1] Before the oral argument, Petitioners moved for an additional 30 minutes of oral argument for reasons virtually identical to those the United States now adduces to support its motion for leave to file a post-argument memorandum. The only party which objected to our request was the United States.

Indian and non-Indian," (*United States Motion* at 2) it is equally appropriate for Petitioners to briefly respond.

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A. ADJUDICATON OF FEDERAL RESERVED RIGHTS IN FEDERAL COURT WILL DUPLICATE STATE COURT PROCEEDINGS OR PRODUCE CONFLICTING DECREES.

1. The assertion by the United States that a separate federal court adjudication would not duplicate or conflict with a concurrent state court general adjudication is fundamentally wrong. No court, state or federal, can determine, in isolation, the extent and priority of reserved water rights without complete knowledge of the availability of water and the nature of prior established rights. Water rights, whether

based upon prior appropriation or federal reservation, are highly interdependent and must be adjudicated in a single comprehensive proceeding. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

After acknowledging both at oral argument and in its post-argument memorandum that Indian water rights are subject to prior rights and the physical availability of water, the United States now argues that a federal court should be permitted to determine Indian water rights in a legal and factual vacuum, "without determining how much water is available or what other claims there may be on the same water source." *United States' Post-Argument Memorandum* at 3. This patently self-contradictory argument is both legally and practically implausible.

The reserved rights doctrine depends in the first instance on the availability of water, because it is legally impossible to imply an *intent* to reserve water that does not exist. See *Cappaert v. United States*, 426 U.S. 128, 139 (1976). Yet, the United States would have a federal court attempt to imply an intent to reserve water which a state court may find is neither legally nor physically available. Reserved rights cannot be quantified in a vacuum—they exist only in relation to the legal and physical availability of water.

Second, it is meaningless and unworkable from a practical standpoint to "quantify" a reserved right without knowing the facts which will necessarily define much of the basis for and limits of that reserved right. Indeed, the government speaks of a decree "conditioned" on ultimate determination of the legal and physical availability of water by the state court. That obviously raises significant probabilities for duplication and conflict—both in adjudication and administration of rights. To the extent the federal court quantification is modified by the facts, as found by

the state court, the federal "conditional" decree is meaningless and duplicative. To the extent the federal court does not abide by the state court findings, there will be conflict between the two courts.

The advantage of a general adjudication is that all parties and facts are before one court, which can determine what water is physically and legally available for the reserved rights asserted by the Indians. The complexity of these inquiries is well-illustrated by the extensive evidentiary proceedings in the Wyoming state court general adjudication. See *Amicus Curiae Brief of the State of Wyoming* at 19 n. 18, and 21-23 nn. 21-25. Moreover, the complexity of these inquiries in Arizona is further exacerbated by the fact that most of the Indian land in Arizona was set aside for Indian use at different points in time. For example, the Navajo Reservation consists of 17 different segments set aside for Indian uses between 1868 and 1958. See *Sekaquaptewa v. McDonald*, 448 F.Supp. 1183, 1185 (D. Ariz. 1978), *modified*, 619 F.2d 801 (9th Cir. 1980). Thus, the priorities of non-Indian water rights will be interspersed with the differing Indian water rights as a result of the different times at which different segments of land were set aside for Indian use. The United States concedes that this "is a complicating factor" but insists that it is no obstacle. *United States' Post-Argument Memorandum* at 5 n. 3.

The only comprehensive general adjudications pending in Arizona are in state court. The specially-designed statutory procedure for the general adjudication of water rights in Arizona specifically provides for the expert assistance of the Arizona Department of Water Resources in ascertaining the hydrological conditions of the watersheds under adjudication. Ariz. Rev. Stat. § 45-256 (Supp. 1982). This specialized technical assistance will enable the state courts efficiently

to determine, for example, which water flows are intermittent, the times and amount of available water flows at different geographical points, and the extent of existing consumptive and non-consumptive uses of water.

An example of how that agency's expertise is used by the state court illustrates why the adjudication of water rights is not as simple as the government suggests. If a federal court were to become aware of a prior right, it might assume that such a prior right would preclude or limit a claimed reserved right. But, the Department conducts on-site, aerial and documentary investigations to identify all possible sources of available water. By knowing the porosity of soils, the history of cropping patterns and the irrigation techniques, the Department might determine that the prior user consumptively used only 60% of its water entitlement, thus freeing 40% for use by others, including claimants of reserved rights. That information is utilized by the state court in confirming existing rights and recognizing new rights. It is an integral part of a general adjudication, but it is not readily available to the federal court.

The government's proposal for conditional federal decrees either duplicates or conflicts with the comprehensive state proceedings in Arizona.

2. The United States cites the decree in *Arizona v. California*, 376 U.S. 340 (1964), as the kind it envisages for a general adjudication. However, that case was not a general adjudication of water rights; instead, it was an original jurisdiction action to determine "how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Id.* at 350. It did not purport to adjudicate all rights on a stream *inter sese*.[1] Neither the

[1] See Report of Special Master, *Arizona v. California*, No. 8 Orig. (December 5, 1960) at 255 (acknowledging that it would "be inappropriate to attempt a determination of the rights and priorities between each Indian Reservation and the myriad individual users who divert water from these tributaries.").

language[2] nor the policy[3] of the McCarran Amendment was applicable to the *Arizona v. California* litigation. Thus, the government's reliance on *Arizona v. California* as authority for its novel interpretation of the McCarran Amendment is misplaced. Nor is the case of *United States v. Gila Valley Irrigation District*, No. E-59-Globe (D.Ariz. June 29, 1935), in which the Gila River water rights of the Gila River Indian Community and the respondent San Carlos Apache Tribe were determined, any reason to endorse further piecemeal litigation in federal court[4] since, as the government well knows,[5] the Gila River Indian Community has formally sought to upset this water rights

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[2] The McCarran Amendment provides in pertinent part that "Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream." 43 U.S.C. § 666(c).

[3] Legislative history also demonstrates that 43 U.S.C. § 666(c) was placed in the McCarran Amendment to clarify congressional understanding that the McCarran Amendment would not apply to the very *Arizona v. California* litigation that the government now uses as a crutch to support its novel interpretation of the McCarran Amendment. See Senate Report No. 755, 82nd Cong., 1st Sess., pt. 1 (1951) at 6; and Hearings on S. 18 Before the Subcommittee of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess. (1951) at 6 and 54.

[4] The government ignores the existence of four decrees in state court covering the Gila River and its tributaries. *E.g., United States (as guardian of the Maricopa Indians) v. Haggard, et al.*, No. 19 (Maricopa County Superior Court) (involving water rights to the Salt River); *Hurley v. Abbott, et al.*, No. 4564 (Maricopa County Superior Court) (involving water rights to the Salt and Verde Rivers); *Benson v. Allison, et. al.*, No. 7589 (Maricopa County Superior Court) (involving water rights to the Salt, Agua Fria and Gila Rivers); and *In the Matter of the Adjudication of the Gila River*, No. 1168 (Graham County Superior Court).

Additionally, the government overlooks the fact that on the separate Little Colorado River watershed, the only determination of water rights to date has been in state court. *St. Johns Irrigation Co. v. Round Valley Water Storage & Ditch Co.*, No. 416 (Apache County Superior Court).

[5] See, *e.g., Brief for the United States* in Nos. 81-2147 and 81-2188, at 38 n. 28. *See also Gila River Indian Community v. United States*, 684 F.2d 852, 865 (Ct. Cl. 1982).

determination, too. Indeed, the kinds of arguments presently before this Court in *Nevada v. United States*, Nos. 81-2245, 81-2276 and 82-38, arising out of other piecemeal federal court litigation of water rights* underscore why this Court should respect Congress' enactment in 1952 of the McCarran Amendment, which this Court has specifically held to be "an affirmative policy in federal law expressly approving litigation of federal water rights in state court." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ____ U.S. ____, 51 U.S.L.W. 4156, 4162 n. 29 (February 23, 1983).

B. THE GOVERNMENT'S PROPOSAL TO SPLIT ITS OWN FEDERAL WATER CLAIMS BETWEEN STATE AND FEDERAL COURT COMPOUNDS THE PROBLEM OF PIECEMEAL ADJUDICATIONS.

Although the United States expressly recognizes the existence of jurisdiction in the Arizona state courts to adjudicate all federal water claims, including those held on behalf of Indian tribes, it nevertheless suggests that jurisdiction over federal claims held on behalf of Indians should be exercised exclusively by the federal courts. On the other hand, the United States agrees that all of its other federal water claims can and should be determined in state court. This inconsistent treatment of federal water rights was rejected by the Court in *Colorado River*, which held that the McCarran Amendment applies to all federal water rights "without any suggestion that there was a distinction between [Indian and non-Indian water rights] for purposes of the Amendment." 424 U.S. at 810. The government's proposal for splitting not only a general stream adjudication but also the determination of federal water rights violates

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* Of course, the litigation of water rights in the Arizona and Nevada federal district courts in *United States v. Gila Valley Irrigation District*, *supra*, and *Nevada v. United States*, *supra*, had taken place before the Congress' enactment in 1952 of the McCarran Amendment.

the McCarran Amendment's clearly-recognized goal of avoiding piecemeal adjudication of water rights, "the interrelationships of which are highly interdependent." *Id.* at 819.

The only justification offered by the United States in support of its proposal is the alleged tradition of exempting Indian property from state court jurisdiction. An identical argument was rejected by this Court in *Colorado River*. 424 U.S. at 812. Nevertheless, in an apparent effort to relitigate this same argument, the United States alludes to Section 4(b) of Public Law 280 [codified at 25 U.S.C. § 1322 (b) and 25 U.S.C. § 1360(b)], 28 U.S.C. § 1362, treaty stipulations[7] and the disclaimer clauses of enabling acts[8] as "indications" justifying exclusive federal court jurisdiction over Indian water claims.

Section 4(b) hardly constitutes any such "indication" since this Court unanimously held in *Bryan v. Itasca County*, 426 U.S. 373 (1976), that "§4(b) in its entirety may be read as ... a congressional intent merely to reaffirm the existing law whatever subsequent litigation might determine it to be." *Id.* at 391-92. *Colorado River* subsequently made that determination as to the adjudication of Indian water rights under the McCarran Amendment. Similarly, Section 1362 does not mandate unfettered access by Indian tribes to federal courts any more than 28 U.S.C. § 1345,

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[7] Of all of the Arizona tribes, only the Navajo treaty of June 1, 1868 remains viable and it makes no mention of water rights, let alone their exclusive adjudication by the federal court. See 15 Stat. 667; I J.A. 296-306. The Apache treaty of July 1, 1852, 10 Stat. 979, relied upon by the San Carlos Apache Tribe, has been declared "dead, having been violated by both sides, and no one was in a position to assert rights thereunder." *United States v. Ft. Sill Apache Tribe of State of Oklahoma*, 533 F. 2d 531, 533 (Ct. Cl. 1976); *Fort Sill Apache Tribe of State of Oklahoma v. United States*, 477 F.2d 1360, 1365-66 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 993 (1974).

[8] It is implausible for the Solicitor General now to rely on the disclaimers, which the United States has already conceded are no bar to state court adjudication of Indian water rights.

which was at issue in *Colorado River*, mandated unfettered access by the United States. The United States' argument that its wards have greater access to federal courts under Section 1362 than the government, their trustee, possesses under Section 1345 is indeed anomalous.

To endorse the admitted piecemealing of federal rights, this Court would have to overrule not only *Colorado River*, but also *Dugan v. Rank*, 372 U.S. 609 (1963), where the Court held that to satisfy the requirements of the McCarran Amendment *all* claimants must be made parties and *all* water rights must be established *inter sese*. *Id.* at 618-19. Upsetting these settled principles now would return water rights adjudications in the West to the chaos of the pre-McCarran era.

C. THE ARIZONA CASES SHOULD NOT BE REMANDED TO THE COURT OF APPEALS.

The government now suggests for the first time that if the Court rejects its "bright-line" scheme, then the Arizona cases should be remanded to review the district court's exercise of discretion in dismissing the Tribes' federal actions under *Colorado River's* considerations of wise judicial administration. This suggestion runs contrary to two recent decisions of this Court which confirm that such a remand would be a needless exercise under the particular circumstances presented by the Arizona cases. First, in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), the Court recognized that the decision to stay or dismiss duplicative federal litigation "is largely committed to the 'carefully considered judgment', *Colorado River*, 424 U.S. at 818, of the district court." 437 U.S. at 663. And, only one month ago in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, this Court reiterated that "[b]y far the most important factor in our decision to approve the

dismissal [in *Colorado River*] was the 'clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system,' *id.*, at 819, as evinced in the McCarran Amendment." 51 U.S.L.W. at 4160.

Here, neither the Tribes nor the United States dispute the piecemeal nature of the Arizona federal actions—five of the seven Arizona Tribes filed actions simply to enjoin any adjudication of their rights. Three other actions were filed for determination of an individual tribe's rights only. In contrast to the Montana actions, no general adjudication proceeding has ever been filed in the Arizona federal court by the United States or any Tribe. The *only* general adjudication proceedings are those pending in the Arizona state courts. In light of the importance placed by this Court on McCarran's policy of avoiding the piecemeal adjudication of conflicting water rights, and the undisputed piecemeal nature of the Arizona federal proceedings, the propriety of the district court's deference to the comprehensive state proceedings under *Colorado River's* reasoning cannot be seriously questioned. Indeed, Judge Merrill, dissenting from the Ninth Circuit's reversal of the Arizona district court, clearly understood that "the [federal] suits now before us would not even constitute piecemeal adjudication; rather, they would result in no effective adjudication at all." Cert. Pet. in No. 81-2147 App. A at 13; 668 F.2d at 1099.

Acceptance of the government's suggestion would only further delay the progress of Arizona's comprehensive general adjudications and the determination of all conflicting rights to the use of its scarcest resource, a result not even the Arizona Tribes would endorse. See *Navajo Brief* at 27-29.

CONCLUSION

There is no new reason in the government's post-argument memorandum supporting any preference of its piecemeal federal court/state court adjudication proposal over the comprehensive proceedings in the Arizona State courts.

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